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No. 00-0000

IN THE
Supreme Court of the United States

FREDERICK FRANK
Petitioner

v.

JOSEPH NARA
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the criteria used by the court of appeals for determining whether a state prisoner has "fairly presented" his federal claim to the state courts – which does not require the prisoner to cite to a federal source of law or to label the claim as federal – is contrary to the exhaustion requirement described in *Baldwin v. Reese*, 541 U.S. 27 (2004).

2. Whether the criteria used by the court of appeals for determining whether a state prisoner has "fairly presented" his federal claim to the state courts – which allows the prisoner to raise a federal claim by implication by citing analogous state law – is contrary to the exhaustion requirement set forth in *Baldwin v. Reese*, 541 U.S. 27 (2004).

3. Whether the decision of the court of appeals that state prisoner Joseph Nara "fairly presented" his federal due process claim to the Pennsylvania courts is contrary to *Duncan v. Henry*, 513 U.S. 364 (1995), and *Baldwin v. Reese*, 541 U.S. 27 (2004), when Nara failed to label his claim as a federal or due process claim, failed to cite the state courts to any federal source of authority in support of his claim, and relied exclusively on state court cases, in particular *Commonwealth v. Marshall*, 312 A.2d 6 (Pa. 1973), which contains no reference to federal law or due process.

PARTIES TO THE PROCEEDING

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OPINIONS AND ORDERS BELOW

The opinion and order of the court of appeals denying the Commonwealth's motion to stay mandate is published and is reprinted in Pet. App. 1a. *Nara v. Frank*, 494 F.3d 1132 (3d. Cir. 2007). The order of the court of appeals denying the Commonwealth's petition for rehearing is unpublished and is reprinted in Pet. App. 1b. The order of the court of appeals amending its opinion is unpublished and is reprinted in Pet. App. 1c. The opinion and order of the court of appeals affirming the district court is published and is reprinted in Pet. App. 1d. *Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007). The order of the district court adopting the magistrate judge's report and recommendation is unpublished and reprinted in Pet. App. 1e. The magistrate judge's report and recommendation recommending that the petition for writ of habeas corpus be granted is unpublished and reprinted in Pet. App. 1f.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the district court's order granting the petition for writ of habeas corpus on May 8, 2007. The court of appeals amended its opinion and denied rehearing on June 12, 2007. On August 29, 2007, this Court extended the time for the filing of this petition until November 9, 2007. *Frank v. Nara*, No. 07A185. The petition was mailed to the Court in compliance with Rule 29.2 on November 9, 2007, but returned for corrections on November 16,

2007, pursuant to Rule 14.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 of the United States Code provides in relevant part:

> (b)[1] An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)[i] there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

STATEMENT OF THE CASE

On February 1, 1984, Joseph Nara was arrested and charged with the murders of his wife Delorean Churby and her mother Virginia Ruth Churby. The investigation revealed that on January 28, 1984, at approximately 8:00 p.m., Nara broke into Mrs. Churby's trailer located in Georges Township, Fayette County, Pennsylvania, armed with a loaded .45 caliber automatic. Once inside the trailer, Nara shot his wife two times and her mother three times in the presence of two young children. Prior to the murders, Nara told several people about his plans to kill his wife. After the murders, Nara fled Pennsylvania, but called the Pennsylvania State Police from a motel room in North Carolina and confessed to the murders. Nara was arrested in North Carolina, and was promptly returned to Pennsylvania to answer the charges.

Shortly after his arrest, defense counsel filed a petition for mental examination. The petition was granted, and Nara was originally committed to Mayview State Hospital for a period not to exceed sixty days. However, Nara was discharged after only four days and returned to prison because he did "not appear to be mentally ill, or in need of treatment."

On June 20, 1984, pursuant to a plea agreement, Nara appeared before the trial court and entered guilty pleas to both counts of first-degree murder in exchange for concurrent sentences of life imprisonment. Prior to accepting the guilty pleas, the trial court conducted an exhaustive, on-the-record

colloquy, during which time Nara openly admitted his guilt, repeatedly expressed his understanding of the proceedings, denied under oath having any mental or emotional problems, and communicated intelligently with the court for approximately 1½ hours. During the sentencing, Nara stated that he was deeply sorry for what he had done.

Nara did not file any post-sentence motions, nor did he file a direct appeal.

A. First State Postconviction Petition

On April 25, 1988, Nara filed a *pro se* petition for relief and supporting brief pursuant to the Pennsylvania Post-Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et. seq.*, in which he argued that he was incompetent at the time he entered his guilty pleas and that he received ineffective assistance of counsel. Counsel was appointed to represent Nara, and the PCRA court held a hearing on June 17, 1988, and June 21, 1988. On October 17, 1988, the PCRA court denied Nara's petition.

Nara filed a timely appeal to the Pennsylvania Superior Court, raising only ineffectiveness claims. On March 29, 1989, the Superior Court affirmed the Order of the PCRA court and dismissed Nara's appeal. Nara subsequently filed a petition for allowance of appeal with the Pennsylvania Supreme Court. While Nara raised a federal due process claim in his petition, he did not base that claim on the ground that he was incompetent to plead guilty. The Pennsylvania Supreme Court denied Nara's petition for allowance of appeal on September 21, 1989.

B. Second State Postconviction Petition

On May 15, 1990, Nara filed a second PCRA petition wherein he sought to withdraw his guilty pleas based on a claim of mental incompetency. Nara made no mention of due process in his petition. The PCRA court held hearings on June 27, 1990 and November 19, 1990, and once again no mention of federal law or due process was made. On January 30, 1991, the PCRA court granted Nara's petition and directed that Nara's guilty pleas be withdrawn. The PCRA court concluded that Nara established a "manifest necessity" to withdraw his plea under state law. The PCRA court made no mention of federal law or due process in its opinion.

The Commonwealth appealed to the Pennsylvania Superior Court. In his brief to the Superior Court, Nara addressed the issue of incompetency, but based his claim squarely upon *Commonwealth v. Marshall*, 312 A.2d 6 (Pa. 1973), which makes no reference to federal law or due process and was decided solely on state law grounds. Nara similarly made no mention of federal law or due process anywhere in his brief. On April 30, 1992, the Superior Court vacated the PCRA court's order and reinstated Nara's guilty pleas, finding that the issue of Nara's competence had been waived under state law. The Superior Court made no mention of federal law or due process in its opinion. Nara then filed a petition for allowance of appeal in the Pennsylvania Supreme Court. While Nara did make passing reference to the federal due process clause in his petition, he did not base his

claim on incompetency. Rather, he argued that the Superior Court violated his federal due process rights by vacating the order of the PCRA court on state-law waiver grounds. The Pennsylvania Supreme Court denied Nara's petition on October 7, 1992. This Court denied Nara's petition for *certiorari* on March 22, 1993. *Nara v. Pennsylvania*, 507 U.S. 995 (1993).

C. Third State Postconviction Petition

On December 21, 1995, Nara filed a third PCRA petition, alleging a federal due process violation on the grounds of ineffective assistance of counsel, as well as a claim that the factual basis for the guilty plea was insufficient. The court appointed attorney Phyllis Jin, Esquire, to represent Nara and scheduled a hearing for April 30, 1996. At the hearing, Nara's counsel asked to withdraw his third PCRA petition because the issue he raised was "previously litigated" in favor of filing a motion to withdraw his guilty plea *nunc pro tunc* pursuant to Pennsylvania Rule of Criminal Procedure 321. The Court granted Nara's motion and issued a briefing schedule. On June 23, 1996, Attorney Jin filed a memorandum in support of Nara's motion to withdraw his guilty plea. On September 30, 1996, the PCRA court denied Nara's motion to withdraw his pleas, concluding that Nara had been advised at his sentencing hearing in 1984 of his right to move to withdraw the pleas within ten days. The court found that Nara failed to state a compelling reason that explained his decision to wait twelve years before he sought to withdraw his guilty plea.

On July 9, 1997, the Superior Court affirmed the trial court's decision which denied Nara's motion to withdraw his guilty pleas. On December 8, 1997, the Pennsylvania Supreme Court denied Nara's petition for allowance of appeal. Nara's filings in the Pennsylvania Superior and Supreme Courts relied exclusively on state law, and there was no mention of federal law or due process in either of these documents.

D. Federal *Habeas* Petition

On or about January 4, 1999, the district court received Nara's federal *habeas corpus* petition. The district court referred the case to a magistrate judge, who recommended that the petition be dismissed as untimely. The district court adopted the magistrate judge's recommendations and dismissed Nara's federal habeas petition. However, the court of appeals reversed and remanded the case to the district court with directions to conduct an evidentiary hearing in order to determine whether equitable tolling was warranted. *Nara v. Frank,* 264 F.3d 310, 319-20 (3d Cir.2001), *overruled in part by Carey v. Saffold,* 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002). Following an evidentiary hearing, the district court concluded that equitable tolling was warranted and that Nara's petition should be considered to have been timely filed. *Id.*

Nara filed an amended petition on September 23, 2004. In his amended petition, Nara argued *inter alia* that his federal due process rights were violated because he was mentally incompetent at the time he entered his guilty pleas. The Commonwealth

answered the amended petition, arguing *inter alia* that Nara's claim was procedurally barred because he did not exhaust or "fairly present" his federal due process claim in the Pennsylvania courts, and that the time for doing so had expired. On September 1, 2005, the magistrate judge issued a report recommending that the amended petition be granted and that Nara be permitted to withdraw his guilty pleas. In so doing, the magistrate judge concluded that Nara had "fairly presented" his federal due process claim to the Pennsylvania courts because Nara "relied on state cases employing the correct constitutional analyses and presented his claim in specific terms that directly pointed to a right protected by the Constitution." The report and recommendation was adopted by the district court on September 27, 2005.

The court of appeals affirmed. *Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007).[1] Addressing the exhaustion issue, the court of appeals used the following standard:

> A petitioner can "fairly present" his claim through: (a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

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[1]The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, 2253.

Nara, 488 F.3d at 198 (citing *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir.1999)). Applying this standard, the court of appeals concluded that Nara "fairly presented" his federal due process claim to the Pennsylvania courts because:

> Nara's second petition included a claim that his guilty plea was "unlawfully induced." Appendix at 436. [Nara's attorney] orally amended Nara's *pro se* petition to specifically include the argument that Nara was "not competent to make a knowledgeable and willing plea at the time he entered it." Appendix at 448. After [the trial court] granted Nara's petition and the Commonwealth appealed, Nara argued that he established his mental incompetency to plead guilty, articulated the test applied by both federal and state courts, and compared the facts of his case to *Com. v. Marshall*, 454 Pa. 413, 312 A.2d 6 (1973). Appendix at 885-87. When he again sought *allocatur*, Nara specifically raised "the invalidity of his plea," and, citing *Marshall*, stated that he "was mentally ill and incompetent to knowingly answer the plea court's questions." Appendix at 830. Nara consistently presented the basic factual outline of a federal claim. The Pennsylvania courts were not required to search beyond the pleadings and briefs for a federal issue. *Compare Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct.

> 1347, 158 L.Ed.2d 64 (2004), *and Bronshtein v. Horn*, 404 F.3d 700, 725-26 (3d Cir.2005). We conclude Nara properly exhausted his incompetency claim.

Nara, 488 F.3d at 198-199. The court of appeals arrived at this conclusion even though Nara failed to label his incompetency claim as federal, failed to cite the state courts to any federal source of authority in support of his incompetency claim, and relied exclusively on state court cases, in particular *Commonwealth v. Marshall*, which contains no reference to federal law or due process whatsoever.

This petition follows.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of *certiorari* in this federal habeas corpus case because there is a conflict between the court of appeals below and other federal courts of appeal on the issue of what constitutes exhaustion or "fair presentation" of a federal claim to a state court when a state prisoner does not label the claim as federal or cite to a federal source of law. In *Baldwin v. Reese*, 541 U.S. 27 (2004) and *Howell v. Mississippi*, 543 U.S. 440 (2005), this Court declined to address the issue of whether a state prisoner's citation to a state-law rule that is identical to federal law would be sufficient to satisfy the exhaustion requirement. Since that time, the federal courts of appeal are split on the issue. This conflict is central to the outcome of this case, and this Court should grant this petition in order to resolve the conflict.

"An application for a writ of habeas corpus on behalf of a person in state custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1)(A). In *Picard v. Connor*, 404 U.S. 270 (1971), this Court held that the exhaustion requirement requires state prisoners to "fairly present" federal claims to each appropriate state court in order to give the State an "opportunity to pass upon and correct" alleged violations of federal rights. *Id.* at 512.

Three years ago, in *Baldwin v. Reese*, 541 U.S. 27 (2004), this Court held that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Id.* at 32. In so doing, this Court indicated that:

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

Id. at 32 (hereinafter "*Baldwin* criteria"). One year later, this Court relied upon the *Baldwin* criteria in dismissing a writ of *certiorari* as improvidently granted. In *Howell v. Mississippi*, 543 U.S. 440 (2005) (per curiam), this Court held that a state prisoner failed to "fairly present" his federal claim to the state courts because "he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." *Id.* at 443. Endorsing the *Baldwin* criteria, this Court noted "the same steps toward clarity are just as easy to take and are generally necessary to establish that a federal question was properly presented to a state court." *Id.* at 444.

The federal courts of appeal have generally interpreted the *Baldwin* criteria as illustrative rather

than binding, despite the language in *Howell* that such language is "generally necessary." *Id.* Fueled in part by other language in the *Howell* opinion in which the Court assumed without deciding that the "fair presentation" requirement might be satisfied if the state prisoner cites to state law that is "identical" or "virtually identical" to federal law, a split in the circuits has emerged on the issue of what constitutes "fair presentation" of a federal claim to a state court when the state prisoner does not label his claim as federal or cite to a federal source of law. For example, the First, Second and Third Circuits have held that citation to a state case addressing a state claim that is "indistinguishable from" or "shares the same legal standard" as one arising under federal law is sufficient to satisfy the exhaustion requirement. *Clements v. Maloney*, 485 F.3d 158 (1st. Cir. 2007); *Jackson v. Edwards*, 404 F.3d 612 (2d. Cir. 2005); *Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007). The Eighth Circuit has held to the contrary. *Carney v. Fabian*, 487 F.3d 1094 (8th Cir. 2007) ("In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts.") (emphasis supplied). Moreover, several Circuits have created other, more ambiguous factors for determining whether the exhaustion requirement is satisfied in the absence of a federal label or citation to federal sources of law. For example, the Second, Third, Sixth, and Seventh Circuits have all held that an allegation of a pattern of facts that is "well within the mainstream of constitutional litigation" is sufficient to satisfy the exhaustion requirement. *DiSimone v. Phillips*, 461

F.3d 181 (2d. Cir. 2006); *Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007); *Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006); *Lieberman v. Thomas*, --- F.3d ---, 2007 WL 2937074 (7th Cir. 2007). The First Circuit has rejected this factor. *Adelson v. DiPaola*, 131 F.3d 259, 263 (1st. Cir. 1997) ("Rhetoric arguing that a claim previously asserted without federal citation or other conspicuous federal emblemata nonetheless fell within some hypothetical 'mainstream of constitutional litigation' has an oxymoronic quality.")

This conflict between the Circuits is central to the outcome of this case. The court of appeals held that state prisoner George Nara "fairly presented" his federal due process claim to the Pennsylvania courts that he was incompetent to plead guilty to two counts of first degree murder. This decision was predicated on two factors: (1) Nara's use of certain buzzwords in his state court filings – that his guilty plea was "unlawfully induced" and that he was "not competent to make a knowledgeable and willing plea" – that the court of appeals concluded were terms "so particular as to call to mind a specific right protected by the Constitution"; and (2) Nara's citation to *Commonwealth v. Marshall*, 454 Pa. 413, 312 A.2d 6 (1973), which contains no references to federal law but describes a state standard for determining incompetency that is virtually identical to federal law.

The decision of the court of appeals appears to strongly conflict with the requirements of *Baldwin* and *Duncan* that state prisoners label their claims as federal or cite to federal source of law in their state court filings to satisfy the exhaustion requirement. *See Howell*, 543 U.S. at 444 (describing the *Baldwin*

criteria as "generally necessary to establish that a federal question was properly presented to a state court."). Indeed, the record is clear that Nara failed to label his incompetency claim as federal in his state court filings, failed to cite the state courts to any federal source of authority in support of his incompetency claim, and relied exclusively on state court cases, in particular *Commonwealth v. Marshall*, which contains no reference to federal law or due process whatsoever.

In the alternative, even if this Court intended the *Baldwin* criteria to be illustrative rather than binding, Nara is situated in the Third Circuit, which uses a broad, four-pronged test for determining whether a state prisoner has exhausted his federal claim:

> A petitioner can "fairly present" his claim through: (a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Nara, 488 F.3d at 198 (citing *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir.1999)). As illustrated in the lower courts, this standard permits a state prisoner to satisfy the exhaustion requirement by citing to state cases that rely on state law that is analogous to federal law. If Nara were located in the Eighth

Circuit, such language would not be enough. The final outcome of this twenty-three year old double-murder case should not depend upon something so arbitrary as the location of the crime. A writ of *certiorari* should issue.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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